



[6714-01-P]

**Federal Deposit Insurance Corporation**

**12 CFR Parts 303 and 391**

**RIN: 3064-AE24**

**Filing Requirements and Processing Procedures for Changes in Control with respect to State Nonmember Banks and State Savings Associations**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC)

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The FDIC is proposing to amend its filing requirements and processing procedures for notices filed under the Change in Bank Control Act (Notices). The proposed amendments are intended to accomplish several objectives. First, the proposed rule would consolidate into one subpart the current requirements and procedures for Notices filed with respect to State nonmember banks and certain parent companies thereof, and the requirements and procedures for Notices filed with respect to State savings associations and certain parent companies thereof. Second, the proposed rule would rescind the FDIC's separate regulation governing the requirements and procedures for Notices filed with respect to State savings associations and certain parent companies thereof and would rescind any guidance issued by the Office of Thrift Supervision (OTS) relating to changes in control of State savings associations that is inconsistent with the proposed rule. Third, the proposed rule would adopt the best practices of the related regulations of the Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System (Board of Governors). Finally, the proposed rule would clarify the FDIC's requirements and procedures based on its experience interpreting and implementing the existing regulation. This proposed rule is also part of the

FDIC's continuing review of its regulations under the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN 3064-AE24, by any of the following methods:

- **Agency Website:** <http://www.fdic.gov/regulations/laws/federal/>.

Follow instructions for submitting comments on the Agency website.

- **E-mail:** [Comments@fdic.gov](mailto:Comments@fdic.gov). Include the RIN 3064-AE24 on the subject line of the message.
- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17<sup>th</sup> Street, N.W., Washington, DC 20429.
- **Hand Delivery:** Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

**Public Inspection:** All comments received must include the agency name and RIN 3064-AE24 for this rulemaking. All comments received will be posted without change to

<http://www.fdic.gov/regulations/laws/federal/>, including any personal information provided.

Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1002, Arlington, VA 22226 by telephone at 1 (877) 275-3342 or 1 (703) 562-2200.

**FOR FURTHER INFORMATION CONTACT:** Ann Johnson Taylor, Supervisory Counsel, [AJohnsonTaylor@fdic.gov](mailto:AJohnsonTaylor@fdic.gov); Gregory S. Feder, Counsel, [GFeder@fdic.gov](mailto:GFeder@fdic.gov); Rachel J. Ackmann, Senior Attorney, [RAckmann@fdic.gov](mailto:RAckmann@fdic.gov); Robert C. Fick, Senior Counsel, [RFick@fdic.gov](mailto:RFick@fdic.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Section 7(j) of the Federal Deposit Insurance Act (FDI Act) generally provides that no person may acquire control of an insured depository institution unless the person has provided the appropriate Federal banking agency prior written notice of the transaction and the banking agency has not objected to the proposed transaction (the Change in Bank Control Act).<sup>1</sup> Subpart E of part 303 of the FDIC's rules and regulations<sup>2</sup> (subpart E of part 303) implements section 7(j) of the FDI Act and sets forth the filing requirements and processing procedures for Notices filed with respect to the proposed acquisition of State nonmember banks and certain parent companies thereof.<sup>3</sup>

The Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301, et seq. (Dodd-Frank Act), among other things, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. On July 21, 2011, (the transfer date established by section 311 of the Dodd-Frank Act), the powers, duties, and functions formerly assigned to, or performed by the OTS were transferred to the FDIC, as to

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<sup>1</sup> 12 U.S.C. 1817(j).

<sup>2</sup> 12 CFR 303.80 et seq.

<sup>3</sup> A State nonmember bank that is either an industrial loan company, a trust company, or a credit card bank is not a "bank" under the Bank Holding Company Act ("BHC Act"). 12 U.S.C. 1841(c)(2). Therefore, a company that is not a bank holding company and that seeks to acquire one or more such State nonmember banks would not be subject to supervision by the Board of Governors. As a result, such a company would have to file a Notice with, and obtain the approval of, the FDIC.

State savings associations;<sup>4</sup> the OCC, as to Federal savings associations; and the Board of Governors, as to savings and loan holding companies.<sup>5</sup> Section 316(b) of the Dodd-Frank Act provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS.<sup>6</sup> The section provides that if such materials were in effect on the day before the transfer date, they continue to be in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act, further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations which would be enforced by each agency.<sup>7</sup> On June 14, 2011, the Board approved a “List of OTS Regulations to be Enforced by the OCC and the FDIC pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act”. This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.<sup>8</sup>

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act granted the OCC rulemaking authority relating to savings associations, nothing in the Dodd-Frank Act affected the FDIC’s existing authority to issue regulations under the FDI Act and other laws as the “appropriate Federal banking agency” or under similar statutory terminology.<sup>9</sup> Section 312(c) of the Dodd-Frank Act amended section 3(q) of the FDI Act and designated the FDIC as the “appropriate

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<sup>4</sup> As of June 2014, there are 54 State savings associations insured by the FDIC.

<sup>5</sup> 12 U.S.C. 5411.

<sup>6</sup> 12 U.S.C. 5414(b).

<sup>7</sup> 12 U.S.C. 5414(c).

<sup>8</sup> 76 FR 39246 (July 6, 2011).

<sup>9</sup> 12 U.S.C. 5412(b)(2)(B)(i)(II).

Federal banking agency” for State savings associations.<sup>10</sup> As a result, when the FDIC acts as the designated “appropriate Federal banking agency” (or under similar terminology) for State savings associations, as it does in the proposed rule, the FDIC is authorized to issue, modify, and rescind regulations involving such associations.<sup>11</sup>

As noted above, on June 14, 2011, operating pursuant to this authority, the Board reissued and redesignated certain regulations transferred from the former OTS. These regulations were adopted and issued as new FDIC regulations at parts 390 and 391 of title 12. When it republished these regulations as new FDIC regulations, the FDIC specifically noted that staff would evaluate the transferred regulations and might later recommend amending them, rescinding them, or incorporating the transferred regulations into other FDIC rules as appropriate.

Certain of the regulations transferred to the FDIC govern acquisitions of State savings associations under the Change in Bank Control Act (transferred CBCA regulation).<sup>12</sup> The FDIC is proposing to incorporate portions of those regulations into the FDIC’s subpart E of part 303 and to rescind the transferred CBCA regulation. In addition to consolidating and conforming the change in control regulations for both State nonmember banks and State savings associations, the proposed rule would increase the consistency of subpart E of part 303 with the OCC’s and the Board of Governors’ related regulations by incorporating certain best practices of those regulations into subpart E of part 303.<sup>13</sup> Also, the FDIC is generally updating its subpart E of part 303 to provide greater transparency to its change in control regulation based on its experience interpreting and implementing the Change in Bank Control Act.

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<sup>10</sup> 12 U.S.C. 1813(q).

<sup>11</sup> 12 U.S.C. 1819(a)(Tenth).

<sup>12</sup> 12 CFR Part 391, Subpart E, entitled Acquisitions of Control of State Savings Associations.

<sup>13</sup> 12 CFR 5.50 et seq. (OCC) and 12 CFR 225.41-.43 (Board of Governors).

## **II. Proposed Rule**

### **a. Section 303.80 Scope**

The scope of the proposed rule makes it clear that subpart E of part 303 would apply to acquisitions of control of State nonmember banks, State savings associations, and certain companies that control one or more State nonmember banks and/or State savings associations (parent companies). The FDIC believes that expanding the scope of subpart E of part 303 to include State savings associations and certain parent companies<sup>14</sup> and rescinding the transferred CBCA regulation would both streamline its rules and procedures and increase regulatory consistency for all FDIC-supervised institutions. To that end, the proposed rule defines the term “covered institution” to include an insured State nonmember bank, an insured State savings association, and certain companies that control, directly or indirectly, an insured State nonmember bank or an insured State savings association.

In addition, the proposed rule would amend the scope of subpart E of part 303 to state that the subpart implements the Change in Bank Control Act<sup>15</sup> to clarify that the subpart includes the procedures for filing and processing a Notice and also sets forth the circumstances that require the filing of a Notice.

### **b. Section 303.81 Definitions**

#### **1. Acting in Concert**

The proposed rule would define “acting in concert” as “knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a covered institution whether or not pursuant to an agreement.” This definition is not substantively different from the

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<sup>14</sup> A company that is not a bank holding company nor a savings and loan holding company and that seeks to acquire a State savings association that operates solely in a fiduciary capacity would not be subject to supervision by the Board of Governors. Such a company would have to file a Notice with, and obtain the approval of, the FDIC.

<sup>15</sup> The proposed rule uses language adopted from the transferred CBCA regulation.

definition of “acting in concert” in the existing subpart E of part 303.<sup>16</sup> The only proposed modification is updated terminology. Specifically, the modification is to replace “insured state nonmember bank or a parent company” with “covered institution” to reflect that the FDIC is also the appropriate Federal banking agency for State savings associations. The FDIC does not believe any further modifications are necessary. The FDIC is not adopting the comparable definition from the transferred CBCA regulation because the definition in the existing subpart E of part 303 is broad enough to include the specific circumstances described in the transferred CBCA regulation and is clear and easy to understand.<sup>17</sup>

The FDIC notes that a group of persons acting in concert becomes a different group of persons acting in concert when a member of the group leaves or a new member joins. For example, if certain members of a family have previously filed a Notice with, and received a non-objection from, the FDIC as a group acting in concert, each member of the group must file a new Notice and obtain the FDIC’s non-objection when a member of the group ceases participation in the group and the group continues to hold sufficient shares to constitute “control.”

The FDIC also notes that if a person who is a member of a group acting in concert proposes to acquire voting securities that result in that person holding 25 percent or more of the voting securities in his/her/its own right, then the person must file a Notice with the FDIC because that person will have acquired control as defined by the Change in Bank Control Act. Such a person must file a Notice even if that person had already filed and been approved as a member of the group acting in concert.

The FDIC further notes that it will look closely at transactions where a lead investor has a material role in organizing a bank’s capital offering. The presence of a lead investor(s) who

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<sup>16</sup> See 12 CFR 303.81(b).

<sup>17</sup> See 12 CFR 391.41 for the definition of acting in concert in the transferred CBCA regulation.

solicits persons that the lead investor has a pattern of co-investing with suggests that the solicited investors, together with the lead investor, may constitute a group acting in concert. The FDIC will analyze the facts and circumstances of each case to determine whether such persons constitute a group acting in concert.

## 2. Company

As discussed in section II.c.3 below, the proposed rule would add certain rebuttable presumptions of acting in concert, including presumptions relating to companies. The proposed rule would define the term company by reference to section 2 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 et seq.)(BHC Act) and by including a catch-all for any person that is not an individual or group of individuals acting in concert.

## 3. Control

The proposed rule would define “control” as “the power, directly or indirectly, to direct the management or policies of a covered institution or to vote 25 percent or more of any class of voting securities of a covered institution.” This definition is not substantively different from the definition of “control” in the existing subpart E of part 303.<sup>18</sup> The only proposed modification is updated terminology, i.e., replacing “voting shares” with “voting securities” and replacing “insured state nonmember bank or a parent company” with “covered institution” to reflect that the FDIC is also the appropriate Federal banking agency for State savings associations. The proposed rule would not adopt the enumerated conditions in the definition of control from the transferred CBCA regulation because the definition of “control” in the proposed rule is broad enough to include such conditions and enumerating some of the conditions that are probative of control could be read to exclude others.<sup>19</sup>

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<sup>18</sup> See 12 CFR 303.81(c).

<sup>19</sup> See 12 CFR 391.43(a)(1).



#### 4. Convertible Securities

As discussed in section II.c.4, the proposed rule includes a presumption relating to convertible securities. The proposed rule would define convertible securities as debt or equity interests that may be converted into voting securities. The definition is not in the existing subpart E of part 303 or the transferred CBCA regulation, but convertible securities are not uncommon in the industry, and the FDIC's regulations need to recognize the influence they carry.<sup>20</sup>

#### 5. Covered Institution

The proposed rule would define the term "covered institution" as "an insured State nonmember bank, an insured State savings association, and any company that controls, directly or indirectly, an insured State nonmember bank or an insured State savings association other than a holding company that is the subject of an exemption described in either section 303.84(a)(3) or (a)(8)." Therefore, the proposed rule could apply to an individual's acquisition of voting securities of a bank holding company or savings and loan holding company, provided the transaction is not otherwise exempted under 303.84(a)(3) or (a)(8). Subsections (a)(3) and (a)(8) would exempt transactions that are subject to Section 3 of the BHC Act and transactions for which the Board of Governors reviews a Notice. The 303.84(a)(3) and (a)(8) exemptions are discussed in section II.e.3 and 8.

The Board of Governors is not the primary regulator of all companies that control State nonmember banks since some State nonmember banks are not "banks" under the BHC Act.<sup>21</sup> Also, the Board of Governors is not the primary regulator of all companies that control State

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<sup>20</sup> See 12 CFR 225.31(d)(1).

<sup>21</sup> 12 U.S.C. 1841(c)(2).

savings associations. Under the Home Owners' Loan Act<sup>22</sup>, "a company that controls a savings association that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act of 1956" is not a savings and loan holding company.<sup>23</sup> As a result, a company that is not otherwise a bank holding company or a savings and loan holding company and that seeks to acquire control of either a State nonmember bank that is not a "bank" under the BHC Act or a State savings association that functions solely in a trust or fiduciary capacity is subject to the proposed rule and would not be eligible for the exceptions from Notice in 303.84(a)(3) and (a)(8).

## 6. Immediate Family

As discussed in section II.c.3 below, the proposed rule would add certain rebuttable presumptions of acting in concert, including a presumption relating to a person's immediate family. The proposed rule would define "immediate family" as "a person's parents, mother-in-law, father-in-law, children, step-children, siblings, step-siblings, brothers-in-law, sisters-in-law, grandparents, and grandchildren, whether biological, adoptive, adjudicated, contractual, or de facto; the spouse of any of the foregoing; and the person's spouse." This definition is similar to the definitions of "immediate family" in the OCC's and the Board of Governors' related regulations.<sup>24</sup> The FDIC would interpret the term "spouse" to include any formalized domestic relationship, for example, through civil union or marriage. The proposed rule would not adopt the definition of "immediate family" in the transferred CBCA regulation because that definition does not include an acquirer's grandparents or step-relatives.<sup>25</sup> The FDIC believes that these relations typically have a natural tendency to engage in joint or parallel action to preserve or

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<sup>22</sup> 12 U.S.C. 1467a.

<sup>23</sup> 12 U.S.C. 1467a(a)(1)(D)(ii)(II).

<sup>24</sup> See 12 CFR 5.50(d)(4) (OCC) and 12 CFR 225.41(b)(3) (Board of Governors).

<sup>25</sup> See 12 CFR 391.41.

enhance the value of the family's investment.

The FDIC would interpret the term "sibling" as one of two or more individuals having at least one common parent.

Question 1: Is there a more appropriate definition of "immediate family"? For instance, should there be a facts and circumstance element to include situations in which persons were raised by an individual that is not otherwise a member of their immediate family?

#### 7. Person

The proposed rule would define "person" as "an individual, corporation, limited liability company (LLC), partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, voting trust, or any other form of entity; and includes each party to a voting agreement and any group of persons acting in concert." The proposed rule would not adopt the definition of "person" in the transferred CBCA regulation and instead includes an amended version of the definition from the existing subpart E of part 303 because the definition from the existing subpart E of part 303 more closely tracks the definition of person in the Change in Bank Control Act.<sup>26</sup> The proposed rule amends the definition from the existing subpart E of part 303 to explicitly include limited liability companies as persons. The FDIC believes that limited liability companies are more common in the industry than when the statute was enacted in 1978 and therefore merit express recognition as "persons." The proposed rule also would make a number of technical edits. For example, to be grammatically correct the proposed rule would move "voting trust" to the enumerated list of entities.

#### 8. Management Official

As discussed in section II.c.3 below, the proposed rule includes a new presumption of acting in concert relating to a company and its controlling shareholder or management official.

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<sup>26</sup> Compare 12 CFR 391.41 and 12 CFR 303.81(e) with 12 U.S.C. 1817(j)(8)(A).

The proposed rule would define management official as “any officer, LLC manager, director, partner, or trustee of an entity, or other person with policy-making functions.” This definition is substantively identical to the definition previously adopted by the Board of Governors;<sup>27</sup> the only modification beyond updated terminology is the inclusion of the term “LLC manager” to recognize the prevalence of limited liability companies in the industry.<sup>28</sup> Generally, the proposed rule would treat members of an LLC who are not managers similar to shareholders in a corporation. The proposed rule does not adopt the definition of “management official” from the transferred CBCA regulation because the proposed definition is a more accurate description of the persons intended to be covered by the presumption.

#### 9. Voting Securities

Unlike the existing subpart E of part 303, the proposed rule includes a definition of “voting securities.” Including a definition of “voting securities” makes the proposed rule more consistent with the OCC’s and the Board of Governors’ related regulations. The proposed rule would define “voting securities” as shares of common or preferred stock, general or limited partnership shares or interests, membership interests, or similar interests if the shares or interests, by statute, charter, or in any manner, entitle the holder: (i) to vote for, or to select, directors, trustees, managers of an LLC, partners, or other persons exercising similar functions of the issuing entity; or (ii) to vote on, or to direct, the conduct of the operations or significant policies of the issuing entity. The proposed rule further states that shares of common or preferred stock, limited partnership shares or interests, membership interests, or similar interests are not “voting securities” if: (i) any voting rights associated with the shares or interests are limited solely to the

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<sup>27</sup> See 12 CFR 225.2(i).

<sup>28</sup> The updated terminology includes replacing “a bank or other company” with the term “entity” and replacing the term “employee” with the term “person”. The OCC recently also proposed a definition of management official although it is not substantially identical to the Board of Governors’ definition. 79 FR 33260 (June 10, 2014).

type customarily provided by State statute with regard to matters that would significantly and adversely affect the rights or preference of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing entity, or the payment of dividends by the issuing entity when preferred dividends are in arrears; (ii) the shares or interests represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing entity; and (iii) the shares or interests do not entitle the holder, by statute, charter, or in any manner, to select, or to vote for the selection of, directors, trustees, managers of an LLC, partners, or persons exercising similar functions of the issuing entity. The proposed definition of “voting securities” also states that shares of stock or other interests issued by a single issuer are deemed to be the same class of voting shares, regardless of differences in dividend rights or liquidation preference, if the shares are voted together as a single class on all matters for which the shares have voting rights that affect solely the rights or preferences of the shares.

The proposed definition derives from the Board of Governors’ definition of “voting securities” with a few minor modifications.<sup>29</sup> For example, unlike the Board of Governors’ definition, the proposed definition explicitly references LLCs and managers thereof. Additionally, the proposed definition would provide for the existence of nonvoting common stock in addition to nonvoting preferred stock. Similar to the Board of Governors, the FDIC would exclude nonvoting preferred stock that includes the right to elect or appoint directors upon failure of the covered institution to pay preferred dividends from the definition of voting securities until the time the right to vote or appoint directors arises. Once the right to vote for, or appoint, directors arises, any newly controlling person would be required to file Notice with the FDIC. Again, the proposed rule would not adopt the definition of “voting securities” from the

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<sup>29</sup> See 12 CFR 225.2(q)(1).

transferred CBCA regulation because the definition in the proposed rule is a more accurate definition of the securities that could trigger application of the Change in Bank Control Act.

#### 10. Other Definitions

The proposed rule would not define “acquisition” as does existing subpart E of part 303.

The proposed rule also would not adopt several other definitions in the transferred CBCA regulation. For example, the terms “State savings association” and “affiliate” are also not defined in the proposed rule as those terms are defined in the FDI Act. The FDIC is not proposing to adopt these definitions because they were determined to be unnecessary or statutorily defined by the FDI Act.

Question 2: Are there more appropriate definitions for any of the defined terms in the proposed rule? Are there any terms not defined in the proposed rule for which a definition is required? If so, in each case, provide an appropriate definition.

#### **c. Section 303.82 Transactions That Require Prior Notice**

##### 1. Section 303.82(a) Prior notice requirement

Generally, the proposed rule would require any person, whether acting directly or indirectly, alone or in concert with others, to give the FDIC prior written notice before the acquisition of control of a covered institution, unless the acquisition is exempt.<sup>30</sup> This requirement is substantively similar to the prior notice requirement in the existing subpart E of part 303 and the transferred CBCA regulation.<sup>31</sup>

##### 2. Section 303.82(b)(1) Rebuttable presumption of control

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<sup>30</sup> See 12 CFR 303.82(a) and 12 CFR 391.42(a). The FDIC notes that section 391.42(a) of the transferred CBCA regulation includes two specific exceptions (one for certain persons affiliated with a savings and loan holding company and one for mergers with interim companies) that are not explicitly stated in this section of the proposed rule. These exceptions are statutory and included in the rule in section 303.84.

<sup>31</sup> The changes in this provision as compared to subpart E of part 303 include updated terminology, i.e., replacing “voting shares” with “voting securities” and replacing “insured state nonmember bank or a parent company” with “covered institution” to reflect that the FDIC is also the appropriate Federal banking agency for State savings associations. The proposed rule also restructured the provision as compared to Subpart E of Part 303 for clarity.

The proposed rule includes a rebuttable presumption of control whenever a person acquires the power to vote 10 percent or more of a class of voting securities of a covered institution, if either (1) the institution has issued any class of securities subject to the registration requirements of section 12 of the Securities Exchange Act of 1934, or (2) immediately after the transaction, no other person will own a greater proportion of that class of voting securities. One change in the proposed rule from existing subpart E of part 303 is the removal of the provision that if two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of 10 percent or more of a class of voting securities of a covered institution, each such person shall file prior notice with the FDIC. The proposed rule clarifies the FDIC's policy by removing the implication that the largest shareholders only have to file a Notice if they simultaneously acquire the voting securities. By removing that provision, the proposed rule makes it clear that if two or more shareholders own the greatest proportion of a class of voting securities, then each such shareholder must file a Notice. The timing of each shareholder's acquisition is irrelevant.

The transferred CBCA regulation also includes a rebuttable presumption of control, but the presumption is triggered only if there exists one of the enumerated control factors.<sup>32</sup> The enumerated control factors include factors such as that the acquirer would be one of the two largest holders of any class of voting stock; the acquirer would hold 25 percent or more of the total stockholders' equity; the acquirer would hold more than 35 percent of the combined debt securities and stockholders' equity; or the acquirer and/or the acquirer's representatives or nominees would constitute more than one member of the institution's board of directors.<sup>33</sup> The proposed rule does not include any control factors as additional elements to the rebuttable

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<sup>32</sup> 12 CFR 391.43(b).

<sup>33</sup> 12 CFR 391.43(c).

presumption of control. The FDIC notes that the enumerated control factors represent only some of the circumstantial factors that the FDIC would analyze when determining whether a person has acquired the ability to direct the management or policies of a covered institution. The FDIC believes that the determination of whether a person will acquire the power to direct the management or policies of an institution is dependent on the facts and circumstances of the case and that it is impractical and potentially misleading to attempt to list all such factors.

It is also noted that the Board of Governors has issued a policy statement entitled Policy Statement on Equity Investments in Banks and Bank Holding Companies regarding the interpretation of the BHC Act.<sup>34</sup> The policy statement generally established certain guidance regarding the amount of total equity a person can control without the Board of Governors determining that the person has the ability to exercise a controlling influence over the management or policies of a banking organization. A person who acquires total equity in excess of that guidance would likely have to file an application under the BHC Act. The FDIC has found the logic of the policy statement useful in analyzing fact patterns under the Change in Bank Control Act, but has not adopted that policy statement pending further consideration.

Question 3: To what extent and under what circumstances does the control of one-third or more of a covered institution's total equity give such person the power to direct the management or policies of a covered institution? Is there a combination of voting and non-voting securities that gives a person the power to direct the management or policies of a covered institution?

The existing subpart E of part 303 states that ownership interests other than those set forth in the rebuttable presumption of control and that represent less than 25 percent of a class of an institution's voting shares do not constitute control for purposes of the Change in Bank

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<sup>34</sup> See <http://www.federalreserve.gov/newsevents/press/bcreg/20080922c.htm>.



Control Act.<sup>35</sup> The proposed rule does not include this provision because the provision has been a source of confusion regarding the meaning of the term “control”. The FDIC has occasionally addressed questions regarding this provision and now seeks to clarify in the proposed rule that the definition of control would include both the amount of voting securities controlled by a person and a facts-and-circumstance analysis to determine whether a person directs the management or policies of a covered institution. The FDIC notes that the proposed change would not expand the thresholds in the rebuttable presumption of control, and would only remove ambiguity regarding whether the facts and circumstances alone could support a conclusion that a person will have the power to direct the management or policies of a covered institution and therefore will control the institution. Such a facts and circumstance analysis is consistent with the statutory definition of “control” in the Change in Bank Control Act and FDIC’s long-standing practices.

### 3. Section 303.82(b)(2) Rebuttable Presumptions of Acting in Concert

The proposed rule includes new rebuttable presumptions of acting in concert. The acting in concert presumptions included in the proposed rule are generally derived from the rebuttable presumptions of acting in concert in the Board of Governors’ regulations.<sup>36</sup> The OCC recently proposed adopting presumptions consistent with the Board of Governors’ presumptions of acting in concert.<sup>37</sup>

The proposed rule includes an acting in concert presumption with respect to a company and any controlling shareholder or management official of that company. If both the company and controlling shareholder or management official own or control voting securities of a covered institution, then the FDIC would presume that the company and the controlling shareholder or

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<sup>35</sup> 12 CFR 303.82(d).

<sup>36</sup> 12 CFR 225.41(d).

<sup>37</sup> 79 FR33260 (June 10, 2014).

management official are acting in concert.

Second, the proposed rule includes an acting in concert presumption between an individual and the individual's immediate family. If two or more members of an immediate family own or control voting securities of a covered institution, then the FDIC would presume that those persons are acting in concert. The definition of immediate family is discussed in section II.b.5 above.

The proposed rule also includes presumptions of acting in concert between (i) two or more companies under common control or a company and each other company it controls; (ii) persons that have made or propose to make a joint filing under sections 13 or 14 of the Securities Exchange Act of 1934;<sup>38</sup> and (iii) a person and any trust for which the person serves as trustee or any trust for which the person is a beneficiary.

Question 4: Is a rebuttable presumption of acting in concert between persons who both own stock of a covered institution and are management officials or controlling shareholders of an unaffiliated company appropriate? Please support your answer with any relevant data or information.

Question 5: Should the FDIC explicitly exempt certain kinds of trustees from the presumptions of acting in concert, such as a trustee that must vote shares as directed by the beneficiaries? Explain any potential burden or benefit if the FDIC instead relies on trustees to provide a trust document demonstrating that the trustee does not have voting discretion on a case-by-case basis? Also, please discuss whether the proposed rule should include a

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<sup>38</sup> Section 13 of the Securities Exchange Act of 1934 (the Exchange Act) requires the filing of timely and accurate annual and periodic reports, and Section 14 of the Exchange Act requires the filing of proxy materials. For purposes of the reporting provisions of section 13(g), section 13(g)(3) provides that two or more persons acting "as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of" section 13(g)". Section 14 has a similar reporting provision for such persons.

presumption of acting in concert between a person and any trust for which the person is a beneficiary? Please discuss the rationale for your answer and include any supporting data or information.

The proposed rule also includes a presumption that persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a covered institution, other than through revocable proxies as described in 303.84(a)(5), are presumed to be acting in concert. The FDIC believes these presumptions should be included in the proposed rule because the interests of such parties are so aligned that there exists a natural tendency to act together towards a common goal.

The transferred CBCA regulation includes a presumption of acting in concert for a company that provides certain financial assistance to a controlling shareholder or management official of such company to enable the purchase of a State saving association's stock.<sup>39</sup> The FDIC believes that situations in which companies that acquire or hold stock of a covered institution and that provide financial assistance to the company's controlling shareholders or managing officials are included within the presumption between a company and any controlling shareholder or management official. The transferred CBCA regulation also includes a presumption of acting in concert when one person provides credit to, or is instrumental in obtaining financing for, another person to purchase stock of a covered institution.<sup>40</sup> The FDIC does not believe this situation by itself aligns persons' interests as to warrant a presumption of acting in concert. Accordingly, the proposed rule does not include that presumption. However,

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<sup>40</sup> 12 CFR 391.43(d)(3)(ii).

the FDIC notes that providing or facilitating the financing for another person to purchase stock would be evidence of acting in concert that in combination with other facts and circumstances may result in a determination that those persons are acting in concert.

#### 4. Section 303.82(b)(3) Convertible Securities, Options, and Warrants

The proposed rule includes a rebuttable presumption that an acquisition of convertible securities, options, and warrants is presumed to constitute the acquisition of voting securities as if the conversion already occurred or the options or warrants were already exercised. The existing subpart E of part 303 does not explicitly include such a presumption; however, the transferred CBCA regulation, and the related regulations of the Board of Governors, treat such securities in a similar manner. The FDIC's longstanding position is that the acquisition of an option or warrant constitutes the acquisition of the underlying voting securities notwithstanding that they may only be exercised after a period of time. The FDIC also believes that nonvoting interests that may be converted into voting securities at the election of the holder of the convertible securities, or that convert after the passage of time, should be considered voting securities at all times for purposes of the Change in Bank Control Act. However, the FDIC recognizes that nonvoting securities that are convertible into voting securities carry less influence when the nonvoting securities may not be converted into voting securities in the hands of the investor and may only be converted after transfer by the investor: (i) in a widespread public distribution; (ii) in transfers in which no transferee (or group of associated transferees) would receive 2 percent or more of any class of voting securities of the banking organization; or (iii) to a transferee that would control more than 50 percent of the voting securities of the banking organization without any transfer from the investor. The FDIC would generally consider such convertible securities as nonvoting equity.

Question 6: Should convertible securities be conclusively considered voting securities, or should the FDIC allow investors to rebut the presumption that an acquisition of convertible securities constitutes the acquisition of voting securities?

5. Section 303.82(b)(4) Rebuttal of presumptions

The proposed procedures for rebutting a presumption of control would remain unchanged from the existing subpart E of part 303.<sup>41</sup> The procedures for rebutting a presumption of acting in concert would be the same as rebutting a presumption of control. The proposed rule does not include the detailed procedures for rebutting the presumptions included in the transferred CBCA regulation because the FDIC believes that the variety of the facts and circumstances often encountered dictate the more flexible process embodied in the existing subpart E of part 303.<sup>42</sup>

6. Section 303.82(c) Acquisition of Loans in Default

The proposed rule includes an irrebuttable presumption that an acquisition of a loan in default secured by voting securities of a covered institution is deemed to be an acquisition of the underlying voting securities. This treatment would not be substantively different from the treatment of a loan in default secured by voting securities in the existing subpart E of part 303;<sup>43</sup> however, the proposed rule is not identical to existing subpart E of part 303. The FDIC has received questions about the use of the term “presumes” in subpart E of part 303 and whether the presumption is rebuttable. As the presumption is not rebuttable, the proposed rule would clarify this issue by stating that such acquisitions are “deemed” to be an acquisition of the underlying voting securities for purposes of the Change in Bank Control Act.

7. Transferred CBCA Regulation’s Safe Harbor

Notwithstanding any other provisions in the transferred CBCA regulation, the “Safe

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<sup>41</sup> See 12 CFR 303.82(e).

<sup>42</sup> See 12 CFR 391.43(e).

<sup>43</sup> See 12 CFR 303.82(c).

Harbor” provision permits an acquirer of an otherwise controlling interest in a State savings association that has no intention of participating in, or seeking to exercise control over, a State savings association’s management or policies to avoid filing a Notice.<sup>44</sup> To qualify for the safe harbor, the acquirer must make certifications to the FDIC. The proposed rule does not include this regulatory safe harbor. The FDIC believes that any certifications or passivity commitments executed in connection with an acquisition of voting securities must be tailored to the facts and circumstances of each situation and a fixed set of certifications would not likely capture the variety of circumstances presented in such situations.

**d. Section 303.83 Transactions that Require Notice, but Not Prior Notice**

Existing subpart E of part 303 and the transferred CBCA regulation do not require prior notice for the acquisition of voting securities for certain types of acquisitions. For example, both regulations permit a person acquiring voting securities through inheritance or bona fide gift to provide notice within 90 calendar days of the acquisition. Existing subpart E of part 303 and the transferred CBCA regulation, however, differ materially in what transactions are eligible for an after-the-fact notice and the limitations imposed on the acquirer before receiving a non-objection. As discussed in detail below, the proposed rule would materially amend existing subpart E of part 303 by incorporating several aspects of the transferred CBCA regulation.<sup>45</sup>

1. Section 303.83(a)(1)

The proposed rule, like the existing subpart E of part 303 and the transferred CBCA regulation, provides that acquisitions through bona fide gift that result in control of an institution would require the acquirer to provide notice to the FDIC within 90 days after the acquisition.

2. Section 303.83(a)(2)

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<sup>44</sup> 12 CFR 391.43(f).

<sup>45</sup> See 12 CFR 303.83(b) and 12 CFR 391.42(d).

The proposed rule, as does the existing subpart E of part 303, provides that the acquisition of voting securities in satisfaction of a debt previously contracted for in good faith that would otherwise require prior notice requires the acquirer to provide notice to the FDIC within 90 days after the acquisition (note that the acquisition of a defaulted loan secured by an amount of a covered institution's voting securities that would result in the acquirer holding a controlling amount of the institution's voting securities requires prior notice).<sup>46</sup> The transferred CBCA regulation creates separate notice requirements for such acquisitions based on whether the loan was made in the ordinary course of business for the lender; however, the FDIC does not believe that distinction warrants separate notice procedures and therefore the FDIC has not adopted such separate notice requirements.

### 3. Section 303.83(a)(3)

The proposed rule, as does existing subpart E of part 303, would permit an acquirer to provide notice to the FDIC within 90 days after the acquisition of voting securities through an inheritance where the acquisition would result in the acquirer holding a controlling amount of the institution's voting securities. The proposed rule would provide a slightly longer period for filing a notice than the transferred CBCA regulation. The transferred CBCA regulation provides a sixty-day notice period for State savings associations.<sup>47</sup> In the proposed rule, acquirers of State savings associations or parent companies of State savings associations would have the same timeframe (90 days after the acquisition) as acquirers of State nonmember banks or parent companies of State nonmember banks.

### 4. Section 303.83(b)(1)

The proposed rule, like the existing subpart E of part 303 and the transferred CBCA

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<sup>46</sup> See proposed section 303.82(c).

<sup>47</sup> 12 CFR 391.42(d)(1)(v).

regulation, would permit the filing of a Notice within 90 days after being notified of a redemption of voting securities that results in the acquisition of control of the covered institution. The proposed rule is substantively the same as existing subpart E of part 303. The difference relates to a change in regulatory language to reflect that a person might acquire control without acquiring additional voting securities when a covered institution redeems voting securities. For example, if the two largest shareholders hold 23 and 21 percent of a covered institution's voting securities and the covered institution redeems all of the voting securities held by the person with 23 percent, the person with 21 percent would have to file a Notice. As such, the proposed rule uses the term "acquisition of control" instead of "a percentage increase in voting securities". The transferred CBCA regulation provides different notice procedures for redemptions based on whether the redemption is pro rata or is not pro rata.<sup>48</sup> The FDIC does not believe the distinction between types of redemptions merits varying notice procedures. Accordingly, the proposed rule provides that if a person acquires control of a covered institution as a result of a redemption, that person would have 90 days after receiving notice of the transaction to provide notice to the FDIC.

#### 5. Section 303.83(b)(2)

Existing subpart E of part 303 permits a person to provide the FDIC notice within 90 days after receiving notice of a sale of shares by any shareholder that is not within the control of a person and which results in that person becoming the largest shareholder.<sup>49</sup> The proposed rule would revise this provision. Under the proposed rule, if a person gains control as a result of any third-party event or action that is not within the control of the person acquiring control, that person must file a Notice within 90 days of receiving notice of such action. This provision,

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<sup>48</sup> 12 CFR 391.42(d)(1)(iii).

<sup>49</sup> 12 CFR 303.83(b)(2)(ii).



similar to the catch-all in the transferred CBCA regulation, is intended to provide a broader exemption from prior notice requirements than solely an acquisition of control arising from the sale of securities which results in the acquirer becoming the largest shareholder.<sup>50</sup> The FDIC would also interpret the proposed catch-all to include any transfer that results from the operation of law. For example, some trustees are appointed by operation of law, such as a trustee in bankruptcy. Under the proposed rule, the trustees would have to provide the FDIC with a Notice within 90 days after the person receives notice of the acquisition. This provision codifies long-standing FDIC policy. The FDIC notes that if the person acquiring control causes the third-party event or action, then prior notice is required.

6. Section 303.83(c)

The proposed rule would expressly provide that the FDIC may disapprove a Notice filed after-the-fact and that nothing in section 303.83 limits the FDIC's authority to disapprove a Notice. Existing subpart E of part 303 includes this provision with respect to acquisitions of control of State nonmember banks and certain parent companies of State nonmember banks; the proposed rule would also apply this provision to acquisitions of control of State savings associations and certain parent companies of State savings associations.

7. Section 303.83(d)

The proposed rule explicitly states that the relevant information that the FDIC may require under this section may include all of the information typically required for a prior notice; the relevant information may include, without limitation, all the information requested by the Interagency Notice of Change in Control form and the Interagency Biographical and Financial Report. This provision is not in existing subpart E of part 303, but is included in the proposed rule for transparency and to codify long-standing FDIC policy.

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<sup>50</sup> See 12 CFR 391.42(d)(1)(iv).

#### 8. Section 303.83(e)

The proposed rule expressly states that if the FDIC disapproves a Notice, then the notificant must divest control of the covered institution which may include, without limitation, disposing of some or all of the voting securities so that the notificant(s) is no longer in control of the covered institution. This provision is not in existing subpart E of part 303, but is included in the proposed rule for clarity and to codify long-standing FDIC policy.

#### 9. Additional Transferred CBCA Regulation Provisions Not Included

In addition to the provisions discussed above, the proposed rule does not include the express caveat that transactions eligible for after-the-fact notice are only eligible for after-the-fact notice provided that the timing of the transaction is outside the control of the notificant. The FDIC does not believe that it is necessary to state explicitly such a restraint on eligibility for an after-the-fact notice because failure to comply with the statutory or regulatory provisions may subject the acquirer to liability. As a result, the FDIC has historically interpreted the exceptions to prior notice as including this restraint.

#### **e. Section 303.84 Transactions that Do Not Require Notice**

##### 1. Section 303.84(a)(1)

Section 303.84(a)(1) includes grandfather provisions for long-held control interests in covered institutions. Under section 303.84(a)(1)(i), notice would not be required when a person acquires additional voting securities of covered institution if the person held the power to vote 25 percent or more of any class of voting securities continuously since the later of March 9, 1979, or the date the institution commenced business. This exemption from notice requirements is not substantively different from the exemption in the existing subpart E of part 303 and only updates

terminology.<sup>51</sup>

The transferred CBCA regulation has a substantively identical exemption to 303.84(a)(1)(i) in the proposed rule for persons that have previously held the power to vote 25 percent or more of any class of voting securities continuously since March 9, 1979; however, it does not exempt persons who held the power to vote 25 percent or more of any class of voting securities since the date the savings association commenced business.<sup>52</sup> The proposed rule, however, would exempt such an acquisition. As such, compared to the transferred CBCA regulation, the proposed rule would expand the notice exemptions for persons who held the power to vote 25 percent or more of any class of voting securities since the date the savings association commenced business. The FDIC feels this expansion would serve to make the change in control requirements more uniform and consistent between State savings associations, State nonmember banks, and certain parent companies of either. In general, the FDIC does not believe significant reasons exist to treat acquisitions of control of State savings associations or parent companies thereof differently, in this respect, than acquisitions of control of State nonmember banks and parent companies thereof, and has tried to make their treatment as uniform as possible under the proposed rule. Furthermore, because shareholders who have held over 25 percent of the voting securities since the commencement of a State savings association were likely reviewed when the institution acquired its charter and deposit insurance, the FDIC does not believe the same shareholders need to be reviewed a second time when they acquire additional voting securities.

Under section 303.84(a)(1)(ii), notice is not required when a person who is presumed to have controlled a covered institution continuously since March 9, 1979, acquires additional

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<sup>51</sup> See 12 CFR 303.83(a)(1)(i).

<sup>52</sup> 12 CFR 391.42(c)(2)(v)(A) and (B).

voting securities of an institution provided that the aggregate amount of voting securities held does not exceed 25 percent or more of any class of voting securities, or the FDIC has determined that the person has continuously controlled the institution since March 9, 1979.<sup>53</sup> The proposed rule would not amend this exemption for State nonmember banks or certain parent companies thereof. The transferred CBCA regulation included a similar provision, except with a grandfather date of December 26, 1985.<sup>54</sup> The proposed rule would not include the grandfather date from the transferred CBCA regulation; rather it would adopt the same grandfather provisions for State savings associations as are applicable for State nonmember banks. This treatment generally reflects the FDIC's position that State savings associations should be treated in a similar manner to State nonmember banks. In addition, this treatment is consistent with the OCC's proposed treatment of Federal savings associations.<sup>55</sup>

## 2. Section 303.84(a)(2)

The proposed rule would also exempt from notice requirements a person who has controlled a covered institution in compliance with the procedures of the Change in Bank Control Act or the repealed Change in Savings and Loan Control Act, or any regulations issued under either act, and who acquires additional voting securities.<sup>56</sup> Existing subpart E of part 303 and the transferred CBCA have substantially similar provisions.<sup>57</sup>

Question 7: Should the FDIC continue to exempt all future acquisitions of voting securities of an institution once a person has acquired control in compliance with the procedures from the Change in Bank Control Act? Or, should the FDIC limit this exemption to a certain

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<sup>53</sup> 12 CFR 303.83(a)(1)(ii).

<sup>54</sup> The difference in the grandfather date is due to a difference in when the presumptions in the transferred CBCA regulation and existing subpart E of part 303 became effective. The FDIC does not anticipate many persons, if any, would be affected by the proposed March 9, 1979 grandfather date for State savings associations.

<sup>55</sup> 12 CFR 5.50(c)(2).

<sup>56</sup> See 12 CFR 391.42(c)(2)(v)(B) for a similar provision in the transferred CBCA regulation.

<sup>57</sup> 12 CFR 303.83(a)(2) and 391.42(c)(2)(v).

percentage of a class of voting securities of a covered institution? For example, should only acquisitions of up to 50 percent of a class of voting securities be exempt once a person has acquired control in compliance with the procedures from the Change in Bank Control Act? If such a policy is adopted, and a person acquires over 50 percent of a class of voting securities, then a second Notice would be required.

3. Section 303.84(a)(3)

Under the Change in Bank Control Act, and both the existing Subpart E of Part 303 and the transferred CBCA regulation, acquisitions of voting securities that are subject to approval under section 3 of the BHC Act,<sup>58</sup> section 18(c) of the FDI Act,<sup>59</sup> or section 10 of the Home Owners' Loan Act<sup>60</sup> are exempt from notice requirements. These are statutory exemptions.<sup>61</sup>

4. Section 303.84(a)(4)

The existing subpart E of part 303 exempts from notice requirements those transactions that are exempt under the BHC Act, foreclosures by institutional lenders, fiduciary acquisitions by banks, and increases of majority holdings by bank holding companies described in sections 2(a)(5), 3(a)(A), or 3(a)(B), respectively, of the BHC Act, 12 U.S.C. 1841(a)(5), 1842(a)(A), and 1842(a)(B).<sup>62</sup> The proposed rule includes these exemptions, but does not include the text preceding the statutory references. The text, “foreclosures by institutional lenders, fiduciary acquisitions by banks, and increases of majority holdings by bank holding companies” is removed for clarity only; no substantive change is intended or effected. Intended as shorthand reference to the subject matter of the statutory provisions, the text has generated confusion

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<sup>58</sup> 12 U.S.C. 1842 et seq.

<sup>59</sup> 12 U.S.C. 1828(c).

<sup>60</sup> 12 U.S.C. 1467b.

<sup>61</sup> 12 U.S.C. 1817(j)(17).

<sup>62</sup> 12 CFR 303.83(a)(4). The transferred CBCA regulation includes references to exempt transactions in 12 CFR 391.42(c)(2)(i)(A), (ii), (iii), and (iv) that are substantially similar to the exempt transactions included in the proposed rule.

regarding its proper interpretation in that it could be interpreted as limiting the scope of those statutory references. In order to eliminate that confusion, the FDIC proposes to delete the text. Consequently, the proposed rule provides that any transaction described in sections 2(a)(5), 3(a)(A), or 3(a)(B) of the BHC Act by a person described in those provisions is exempt from notice requirements.

#### 5. Section 303.84(a)(5)

The existing subpart E of part 303 exempts a customary one-time proxy solicitation from the notice requirements.<sup>63</sup> The proposed rule would only technically modify this exemption by expressly limiting its applicability to revocable proxies, which is in line with long-standing FDIC interpretation. This exemption would be applicable any time revocable proxies are solicited for a single meeting of a covered institution. This exemption would not cover irrevocable proxies or revocable proxies that do not terminate within a reasonable period after the meeting. The transferred CBCA regulation does not include a similar exemption for the one-time solicitation of revocable proxies.

Question 8: To what extent would the holding of such a proxy allow the holder to significantly influence an institution? In what manner should this exemption be limited, if any?

#### 6. Section 303.84(a)(6)

The existing subpart E of part 303 also exempts from notice requirements the receipt of voting shares through a pro rata stock dividend.<sup>64</sup> The transferred CBCA regulation has a similar exemption, but extends the exemption to stock splits, if the proportional interests of the recipients remain substantially the same.<sup>65</sup> This language is similar to language contained in the

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<sup>63</sup> 12 CFR 303.83(a)(5).

<sup>64</sup> 12 CFR 303.83(a)(6).

<sup>65</sup> 12 CFR 391.42(c)(2)(i)(C).

Board of Governors' change in control regulation.<sup>66</sup> The FDIC believes the effect of a stock split is substantially similar to the effect of a pro rata stock dividend and has incorporated this exemption. Thus, the proposed rule would permit an exemption for an increase in voting securities through both a pro rata stock dividend or a stock split, provided the proportional interests of the recipients remain the same.

7. Section 303.84(a)(7)

The proposed rule, like the existing subpart E of part 303, exempts the acquisition of voting securities in a foreign bank that has an insured branch in the United States.

8. Section 303.84(a)(8)

The existing subpart E of part 303 exempts from notice requirements the acquisition of voting shares of a depository institution holding company that either the Board of Governors or the former OTS reviews under the Change in Bank Control Act.<sup>67</sup> The purpose of this exemption is to avoid duplicate regulatory review of the same acquisition of control by both the Board of Governors and the FDIC. The proposed rule includes this exemption, but removes the reference to the former OTS. The proposed rule also would continue the FDIC's longstanding practice that this exemption is only applicable when the Board of Governors actually reviews a Notice under the Change in Bank Control Act and not when the Board of Governors has jurisdiction but does not require a Notice. Accordingly, if the Board of Governors determines to accept passivity commitments in lieu of a Notice, the FDIC will evaluate the facts and circumstances of the case to determine whether a Notice is required to be filed with the FDIC for the indirect acquisition of control of an FDIC-supervised institution. This revision to the existing subpart E of part 303 is consistent with the language in the transferred CBCA regulation, which

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<sup>66</sup> See 12 CFR 225.42(a)(6).

<sup>67</sup> 12 CFR 303.83(a)(8). This fact pattern would arise, for example, when an individual investor, rather than a company, seeks to acquire control of a bank holding company.

states that transactions for which “a change of control notice must be submitted” to the Board of Governors are exempt from notice requirements.<sup>68</sup> This revision is also consistent with the purpose of the exemptions and the FDIC’s long-standing practice.

#### 9. Other CBCA Exemptions

The transferred CBCA regulation also includes an exemption for acquisitions of up to twenty-five percent of a class of stock by a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25.<sup>69</sup> The proposed rule does not include this provision because such plans are treated in the same manner as any trust. To the extent that a trustee does not have voting rights or the power to direct how the votes will be cast, typically the FDIC would not determine that the trustee has control.

#### **f. 303.85 Filing Procedures**

The filing procedures in the proposed rule would be identical to the filing procedures in the existing subpart E of part 303.<sup>70</sup> The FDIC is not proposing substantial modifications to the filing procedures in the existing subpart E of part 303 because these procedures are well-understood by the industry and have historically been easy to implement by both the FDIC and the industry. The proposed rule would change the filing procedures specified in the transferred CBCA regulation such that acquirers of State savings associations and certain parent companies thereof do not need to file a Notice using the OTS’s Notice Form 1393.<sup>71</sup> Under the proposed rule, a specific notice form would not be required, however, all of the information required by the FFIEC forms would need to be submitted.<sup>72</sup> However, the FDIC encourages the use of the FFIEC Interagency Notice of Change in Control form as well as the Interagency Biographical

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<sup>68</sup> 12 CFR 391.42(c)(2)(iv).

<sup>69</sup> 12 CFR 391.42(c)(2)(i)(E).

<sup>70</sup> See 12 CFR 303.84.

<sup>71</sup> 12 CFR 391.45(a) and (b).

<sup>72</sup> A notificant may choose to use an interagency form requested from an FDIC Regional Director.



and Financial Report.

Additionally, the proposed rule would not specifically state that the notificant may amend the Notice, as in the transferred CBCA regulation, but it is current FDIC policy that notificants can amend a Notice at their own initiative or upon the request of the FDIC.

**g. 303.86 Processing and Disapproval of Notices**

The procedural requirements in the proposed rule are substantively identical to the procedural requirements in the existing subpart E of part 303.<sup>73</sup> Similar to the reasoning for not proposing substantial modifications to the filing procedures in the existing subpart E of part 303, the FDIC is not proposing any substantive changes to the processing procedures in the proposed rule. Relative to the procedural requirements in the existing subpart E of part 303, the only modification proposed would be to state explicitly that the Change in Bank Control Act permits the FDIC to extend the notice period.<sup>74</sup> Material changes for State savings associations, as compared to the transferred CBCA regulation, are discussed below.<sup>75</sup>

First, the proposed rule does not include the provision in the transferred CBCA regulation that failure by a State savings association to respond to a written request for information or documents within 30 calendar days would be deemed a withdrawal of the Notice or rebuttal filing.<sup>76</sup> Instead, any written request for information from the FDIC may include a time-limit within which the institution must respond before the Notice or rebuttal filing would be considered abandoned or withdrawn. This procedure provides more flexibility depending on the depth and amount of information requested.

Second, the limitation in the transferred CBCA regulation restricting the FDIC's

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<sup>73</sup> See 12 CFR 303.85.

<sup>74</sup> See 12 CFR 303.86(b)(1).

<sup>75</sup> See 12 CFR 391.45(c) and 391.46 for relevant provisions of the transferred CBCA regulation.

<sup>76</sup> See 12 CFR 391.45(c)(1).

additional information requests, after the initial information request, to only information regarding matters derived from the initial information request or Notice, or information of a material nature that was not reasonably available for the acquirer, was concealed, or pertained to developments after the time of the initial information request is not included in the proposed rule.<sup>77</sup> The proposed rule does not include such a restriction because the FDIC believes it should have the flexibility to investigate all material information throughout the notice review period.

Additionally, the transferred CBCA regulation includes a list of factors that give rise to a rebuttable presumption that an acquirer may fail the integrity and financial condition statutory factors.<sup>78</sup> For example, if during the 10-year period immediately preceding the filing of the Notice, certain judgments, consents, orders, or administrative proceedings terminated in any agreements or orders issued against the acquirer, or affiliates of the acquirer, by any governmental entity, which involve: (A) fraud, moral turpitude, dishonesty, breach of trust or fiduciary duties, organized crime or racketeering; (B) violation of securities or commodities laws or regulations; (C) violation of depository institution laws or regulations; (D) violation of housing authority laws or regulations; or (E) violation of the rules, regulations, codes of conduct or ethics of a self-regulatory trade or professional organization, there is a rebuttable presumption that the notificant cannot meet the statutory integrity factor. For the financial condition factor, for instance, if the notificant failed to furnish a business plan or furnished a business plan projecting activities which are inconsistent with economical home financing, then there is a rebuttable presumption the notificant cannot meet the financial condition statutory factor. As discussed above, the proposed rule would not adopt the presumption regarding disqualification factors. Nevertheless, the FDIC notes that these are the sort of facts that it considers when

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<sup>77</sup> See 12 CFR 391.45(c)(3).

<sup>78</sup> 12 CFR 391.46(g).

evaluating the financial or integrity factors.

#### **h. 303.87 Public Notice Requirement**

The proposed rule would not substantively amend the public notice requirements in the existing subpart E of part 303.<sup>79</sup> The proposed rule includes minor revisions to the public notice requirements for Notices that are not filed in accordance with the CBCA and this subpart within the time periods specified. The proposed rule harmonizes the public notice requirements for such Notices with the requirements for Notices filed in accordance with the CBCA and this subpart. Material changes for State savings associations, as compared to the transferred CBCA regulation, are discussed below.<sup>80</sup>

First, the transferred CBCA regulation does not explicitly permit the FDIC to delay publication requirements. The proposed rule, like the existing subpart E of part 303, would permit the FDIC to delay the publication required if the FDIC determines, for good cause, that it is in the public interest to grant a delay.

The proposed rule also permits the FDIC to shorten the public comment period to a period of not less than 10 days, or waive the public comment or newspaper publication requirements, or act on a Notice before the expiration of a public comment period, if it determines that an emergency exists or that disclosure of the Notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety and soundness of the institution to be acquired. The transferred CBCA regulation permits the FDIC to waive the public notice period and submission of comments for supervisory reasons.<sup>81</sup> The proposed rule includes the language from the existing subpart E of part 303 and not the broader language from the transferred CBCA regulation because the FDIC believes that

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<sup>79</sup> See 12 CFR 303.86.

<sup>80</sup> See 12 CFR 391.45.

<sup>81</sup> 12 CFR 391.45(g).

such a waiver should be rare and granted only as specified in the existing subpart E of part 303.

The FDIC believes that public comment is an important right and should only be waived for an emergency or serious threats to an institution's safety and soundness.

The transferred CBCA regulation provides for a 30-day comment period, but the existing subpart E of part 303 and the proposed rule include a 20-day comment period.<sup>82</sup> The proposed rule includes a 20-day comment period because in the FDIC's experience the 20-day comment period in the existing subpart E of part 303 has provided potential commenters sufficient time to comment. In addition, a 20-day comment period is preferable because it gives the FDIC sufficient time to review any comments during the limited statutory review period (60-days unless extended further). Finally, a 20-day comment period provides consistency among the Federal banking agencies with respect to State savings associations, State nonmember banks, national banks, and State member banks.

The proposed rule would also require that if a Notice was not filed in accordance with the CBCA and this subpart within the time periods specified, the notificant must publish an announcement of the acquisition of control in a newspaper of general circulation in the community in which the home office of the FDIC-supervised institution acquired is located within 10 days after being directed to file a Notice by the FDIC. This express requirement is not included in the transferred CBCA regulation.

The transferred CBCA regulation includes a provision regarding how an applicant can request that information submitted in connection with a Notice be treated as confidential.<sup>83</sup> The proposed rule does not include these procedures because the FDIC has comparable disclosure and confidentiality regulations in 12 CFR part 309 that already cover such requests.

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<sup>82</sup> 12 CFR 303.86(d) and 12 CFR 391.45(e).

<sup>83</sup> 12 CFR 391.45(f).

Finally, the transferred CBCA regulation explicitly states that the FDIC will notify the State savings association's State supervisor of the filing of a Notice.<sup>84</sup> As this is a statutory requirement, the FDIC does not believe its inclusion in the proposed rule is necessary.

**i. 303.88 Reporting of stock loans and changes in chief executive officers and directors.**

The proposed rule includes two longstanding statutory reporting requirements that are not included in existing subpart E of part 303 or the transferred CBCA regulation. The first statutory reporting requirement relates to any foreign bank, or any affiliate thereof, that has credit outstanding to any person or group of persons which is secured, directly or indirectly, by 25 percent or more of any class of voting securities of a covered institution.<sup>85</sup> The second statutory reporting requirement included in the proposed rule relates to changes in chief executive officers and directors of a bank within 12 months of a change in control being consummated.<sup>86</sup> The proposed rule does not add to, or modify, the existing statutory requirements and only includes the longstanding statutory requirements to enhance transparency for covered institutions.

**j. Other Transferred CBCA Regulation Provisions**

The proposed rule does not include similar language to that in 12 CFR 391.45(i)-(j), which outline additional procedures for Notices that involve other filings to the FDIC. Notificants should review other applicable regulatory sections, such as 12 CFR 303.60 et seq. concerning merger applications or mutual-to-stock conversions for further information on related filings. The FDIC generally prefers not to cross-reference filings that a particular transaction may require. The FDIC notes that acquisitions of voting securities subject to approval under section 18(c) of the FDI Act are exempt from notice requirements.

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<sup>84</sup> 12 CFR 391.45(h).

<sup>85</sup> 12 U.S.C. 1817(j)(9).

<sup>86</sup> 12 U.S.C. 1817(j)(12).

The transferred CBCA regulation also contains a rebuttal of control agreement.<sup>87</sup> The proposed rule does not include this agreement because the FDIC believes that a rebuttal of control should be tailored to the facts and circumstances of each situation, and a standard agreement would not typically capture the various circumstances present in some situations. The FDIC prefers to make any potential rebuttal of control decision only after reviewing the facts and circumstances of the particular acquisition.<sup>88</sup>

The proposed rule also excludes the requirement in the transferred CBCA regulation that certain acquirers of beneficial ownership exceeding 10 percent of any class of stock of a State savings association file a certification of ownership. The FDIC believes that the regulatory burden of these filings exceeds the benefits derived from them.

#### **k. Existing OTS Guidance**

All guidance issued by the OTS that would otherwise apply to changes in control of State savings associations and that is inconsistent with the provisions of any final rule issued by the FDIC on the subject would be rescinded on the effective date of an FDIC final rule regarding changes in control of State savings associations.

In addition to the questions presented above, the FDIC requests comment on all aspects of the proposed rule, including the potential cost and benefits of the proposed rule.

### **III. Regulatory Analyses**

#### **A. Paperwork Reduction Act (PRA)**

In accordance with the requirements of the Paperwork Reduction Act of 1995, the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (“OMB”)

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<sup>87</sup> 12 CFR 391.48.

<sup>88</sup> See also discussion at II.c.7, supra.

control number.<sup>89</sup> The Interagency Notice of Change in Control has previously been approved by the OMB under Control No. 3064-0019 for all covered institutions, including State nonmember banks and State savings associations. This proposed rule would not revise the Interagency Notice of Change in Control form for covered institutions. As such, the proposed rule does not include an information collection as defined under the PRA.

## **B. Regulatory Flexibility Act Analysis**

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to \$550 million). A regulatory flexibility analysis, however, is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the Federal Register together with the proposed rule. For the reasons provided below, the FDIC certifies that the proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

The proposed rule only affects persons acquiring control of covered small banking entities. As such, the rule would not have a significant economic impact on a substantial number of small banking entities as the proposed rule would not impose any new requirements or prohibitions on small banking entities and would not impose any direct costs on small banking entities. As discussed in the preamble, the proposed rule primarily revises the circumstances that require the filing of a Notice for persons acquiring control of a small banking entity. Any impact

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<sup>89</sup> 44 U.S.C. 3501 et seq.

of the proposed rule would be borne by the persons acquiring a controlling interest in a covered institution and not by the covered institution directly. Furthermore, for State nonmember banks and certain of their parent companies, the proposal generally codifies existing FDIC practice and should only marginally affect the number of persons subject to notice requirements. While the changes for State savings associations are more material, the changes generally simplify the requirements under the transferred CBCA regulation and should not materially increase the number of change in control Notices that must be filed. Currently, the FDIC receives approximately 35 change in control Notices each year and the FDIC does not expect the proposed rule to increase the number of Notices received by more than one or two Notices annually. As such, the proposed rule should not have a significant economic impact on a substantial number of small banking entities.

### **C. Plain Language**

Section 722 of the Gramm-Leach-Bliley Act requires the FDIC to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites comment on how to make this proposed rule easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could the FDIC present the rule more clearly?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing)



make the regulation easier to understand? If so, what changes would achieve that?

- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the agencies incorporate to make the regulation easier to understand?

## **List of Subjects**

### **12 CFR Part 303**

Administrative practice and procedure, banks, banking, savings associations, change in bank control.

## **Federal Deposit Insurance Corporation**

### **12 CFR Chapter III**

## **Authority and Issuance**

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation proposes to amend parts 303 and 391 of chapter III of Title 12, Code of Federal Regulations as follows:

### **PART 303—FILING PROCEDURES**

1. Revise the authority citation for part 303 to read as follows:

**Authority:** 12 U.S.C. 378, 1464, 1813, 1815, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p–1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5414; 15 U.S.C. 1601–1607.

2. Revise Subpart E to read as follows:

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**Subpart E-Change in Bank Control Act**

303.80 Scope.

303.81 Definitions.

303.82 Transactions that require prior notice.

303.83 Transactions that require notice, but not prior notice.

303.84 Transactions that do not require notice.

303.85 Filing procedures.

303.86 Processing.

303.87 Public notice requirements.

303.88 Reporting of stock loans and changes in chief executive officers and directors.

303.89-303.99 [Reserved]

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3. Revise Subpart E of part 303 to read as follows:

**Subpart E—Change in Bank Control**

§ 303.80 Scope.

This subpart implements the provisions of the Change in Bank Control Act of 1978, section 7(j) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1817(j)) (CBCA), and sets forth the filing requirements and processing procedures for a notice of change in control with respect to the acquisition of control of a State nonmember bank, a State savings association, or certain parent companies of either a State nonmember bank or a State savings association.

§ 303.81 Definitions.

For purposes of this subpart:

(a) Acting in concert means knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a covered institution whether or not pursuant to an express agreement.

(b) Company means a company as defined in section 2 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 et seq.) and any person that is not an individual.

(c) Control means the power, directly or indirectly, to direct the management or policies of a covered institution or to vote 25 percent or more of any class of voting securities of a covered institution.

(d) Convertible securities mean debt or equity interests that may be converted into voting securities.

(e) Covered institution means an insured State nonmember bank, an insured State savings association, and any company that controls, directly or indirectly, an insured State nonmember bank or an insured State savings association other than a holding company that is the subject of an exemption described in either section 303.84(a)(3) or (a)(8).

(f) Immediate family means a person's parents, mother-in-law, father-in-law, children, step-children, siblings, step-siblings, brothers-in-law, sisters-in-law, grandparents, and grandchildren, whether biological, adoptive, adjudicated, contractual, or de facto; the spouse of any of the foregoing; and the person's spouse.

(g) Person means an individual, corporation, limited liability company (LLC), partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, voting trust, or any other form of entity; and includes each party to a voting agreement and any group of persons acting in concert.

(h) Management official means any officer, LLC manager, director, partner, or trustee of an entity, or other person with policy-making functions.

(i)(1) Voting securities means shares of common or preferred stock, general or limited partnership shares or interests, membership interests, or similar interests if the shares or interests, by statute, charter, or in any manner, entitle the holder:

(i) To vote for, or to select, directors, trustees, managers of an LLC, partners, or other persons exercising similar functions of the issuing entity; or

(ii) To vote on, or to direct, the conduct of the operations or significant policies of the issuing entity.

(2) Nonvoting shares. Shares of common or preferred stock, limited partnership shares or interests, membership interests, or similar interests are not “voting securities” if:

(i) Any voting rights associated with the shares or interests are limited solely to the type customarily provided by State statute with regard to matters that would significantly and adversely affect the rights or preference of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the

terms of the security or interest, the dissolution of the issuing entity, or the payment of dividends by the issuing entity when preferred dividends are in arrears;

(ii) The shares or interests represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing entity; and

(iii) The shares or interests do not entitle the holder, by statute, charter, or in any manner, to select, or to vote for the selection of, directors, trustees, managers of an LLC, partners, or persons exercising similar functions of the issuing entity.

(3) Class of voting securities. Shares of stock or other interests issued by a single issuer are deemed to be the same class of voting shares, regardless of differences in dividend rights or liquidation preference, if the shares are voted together as a single class on all matters for which the shares have voting rights other than matters described in paragraph (i)(2)(i) of this section that affect solely the rights or preferences of the shares.

§ 303.82 Transactions that require prior notice.

(a) Prior notice requirement. Except as provided in Sections 303.83 and 303.84, no person, acting directly or indirectly, or through or in concert with one or more persons, shall acquire control of a covered institution unless the person shall have given the FDIC prior notice of the proposed acquisition as provided in the CBCA and this subpart, and the FDIC has not disapproved the acquisition within 60 days or such longer period as may be permitted under the CBCA.

(b) Rebuttable presumptions.

(1) Rebuttable presumptions of control. The FDIC presumes that an acquisition of voting securities of a covered institution constitutes the acquisition of the power to direct the management or policies of that institution requiring prior notice to the FDIC, if, immediately after the transaction, the acquiring person will own, control, or hold with power to vote 10 percent or more of any class of voting securities of the institution, and if:

(i) The institution has registered securities under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or

(ii) No other person will own, control or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.

(2) Rebuttable Presumptions of Acting in Concert. The following persons who own or control, or propose to own or control voting securities in a covered institution, shall be presumed to be acting in concert for purposes of this subpart:

(i) A company and any controlling shareholder or management official of the company;

(ii) An individual and the individual's immediate family;

(iii) Companies under common control or a company and each company it controls;

(iv) Two or more persons that have made, or propose to make, a joint filing related to the proposed acquisition under sections 13 or 14 of the Securities

Exchange Act of 1934 (15 U.S.C. 78m or 78n), and the rules promulgated thereunder by the Securities and Exchange Commission;

(v) A person and any trust for which the person serves as trustee or any trust for which the person is a beneficiary; and

(vi) Persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a covered institution, other than through revocable proxies as described in 303.84(a)(5).

(3) Convertible securities, Options, and Warrants. The acquisition of convertible securities, options, or warrants is presumed to constitute the acquisition of voting securities.

(4) Rebuttal of presumptions. The FDIC will afford any person seeking to rebut a presumption in this paragraph (b) an opportunity to present views in writing.

(c) Acquisition of loans in default. An acquisition of a loan in default that is secured by voting securities of a covered institution is deemed to be an acquisition of the underlying securities for purposes of this subpart. Before acquiring a loan in default that would result in the acquiring person owning, controlling, or holding with the power to vote a controlling amount of a covered institution's voting securities, the potential acquirer must give the FDIC prior written notice as specified in this subpart.

§ 303.83 Transactions that require notice, but not prior notice.

(a) Notice within 90 days after the acquisition. The following acquisitions of voting securities of a covered institution, which otherwise would require prior notice under this subpart, instead require the acquirer to provide to the appropriate FDIC office within 90 calendar days after the acquisition all relevant information requested by the FDIC:

- (1) The acquisition of voting securities as a bona fide gift;
- (2) The acquisition of voting securities in satisfaction of a debt previously contracted in good faith, except as provided in § 303.82(c); and
- (3) The acquisition of voting securities through inheritance.

(b) Notice within 90 days after receiving notice of the event giving rise to the acquisition of control. The following acquisitions of control of a covered institution, which otherwise would require prior notice under this subpart, instead require the person acquiring control to provide to the appropriate FDIC office, within 90 calendar days after receiving notice of the event giving rise to the acquisition of control, all relevant information requested by the FDIC:

- (1) The acquisition of control resulting from a redemption of voting securities by the issuing covered institution; and
- (2) The acquisition of control as a result of any event or action (including without limitation the sale of securities) by any third party that is not within the control of the person acquiring control.

(c) The FDIC may disapprove a notice filed after an acquisition of control, and nothing in this section limits the authority of the FDIC to disapprove a notice pursuant to § 303.86(c).



(d) The relevant information that the FDIC may require under this section may include all information and documents routinely required for a prior notice as provided in section 303.85.

(e) If the FDIC disapproves a Notice filed under this § 303.83, the notificant(s) must divest control of the covered institution which may include, without limitation, disposing of some or all of the voting securities so that the notificant(s) is no longer in control of the covered institution, within such period of time and in the manner that the FDIC may determine.

§ 303.84 Transactions that do not require notice.

(a) Exempt transactions. The following transactions do not require notice to the FDIC under this subpart:

(1) The acquisition of additional voting securities of a covered institution by a person who:

(i) Held the power to vote 25 percent or more of any class of voting securities of the institution continuously since the later of March 9, 1979, or the date that the institution commenced business; or

(ii) Is presumed, under § 303.82(b) to have controlled the institution continuously since March 9, 1979, if the aggregate amount of voting securities held does not exceed 25 percent or more of any class of voting securities of the institution or, in other cases, where the FDIC determines that the person has controlled the institution continuously since March 9, 1979;

(2) The acquisition of additional voting securities of a covered institution by a person who has lawfully acquired and maintained control of the institution (for purposes of § 303.82) after complying with the procedures, and received the non-objection of the FDIC, of this subpart or the repealed Change in Savings and Loan Control Act, 12 U.S.C. 1730(q), and the regulations thereunder then in effect, to acquire control of the institution;

(3) Acquisitions of voting securities subject to approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842(a)), section 18(c) of the FDI Act (12 U.S.C. 1828(c)), or section 10 of the Home Owners' Loan Act (12 U.S.C. 1467a);

(4) Any transaction described in sections 2(a)(5), 3(a)(A), or 3(a)(B) of the Bank Holding Company Act (12 U.S.C. 1841(a)(5), 1842(a)(A), or 1842(a)(B)) by a person described in those provisions;

(5) A customary one-time solicitation of a revocable proxy;

(6) The receipt of voting securities of a covered institution through a pro rata stock dividend or stock split if the proportional interests of the recipients remain substantially the same;

(7) The acquisition of voting securities in a foreign bank that has an insured branch in the United States. (This exemption does not extend to the reports and information required under paragraphs 9, 10, and 12 of the CBCA (12 U.S.C. 1817(j)(9), (10), and (12))); and

(8) The acquisition of voting securities of a depository institution holding company for which the Board of Governors of the Federal Reserve System reviews a notice pursuant to the CBCA (12 U.S.C. 1817(j)).

§ 303.85 Filing procedures.

(a) Filing notice.

(1) A notice required under this subpart shall be filed with the appropriate FDIC office and shall contain all the information required by paragraph 6 of the CBCA, section 7(j) of the FDI Act, (12 U.S.C. 1817(j)(6)), or prescribed in the designated interagency forms which may be obtained from any FDIC regional director.

(2) The FDIC may waive any of the informational requirements of the notice if the FDIC determines that it is in the public interest.

(3) A notificant shall notify the appropriate FDIC office immediately of any material changes in the information contained in a notice submitted to the FDIC, including changes in financial or other conditions.

(4) When the acquiring person is an individual, or group of individuals acting in concert, the requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary, as required in the designated interagency form, together with a statement of any material changes since the date of the statement or summary. The FDIC may require additional information if appropriate.

(b) Other laws. Nothing in this subpart shall affect any obligation which the acquiring person(s) may have to comply with the federal securities laws or other laws.

#### § 303.86 Processing.

(a) Acceptance of notice, additional information. The FDIC shall notify the person or persons submitting a notice under this subpart in writing of the date the notice is accepted as substantially complete. The FDIC may request additional information at any time.

(b) Commencement of the 60-day notice period: consummation of acquisition.

(1) The 60-day notice period specified in § 303.82 shall commence on the day after the date of acceptance of a substantially complete notice by the appropriate regional director. The notificant(s) may consummate the proposed acquisition after the expiration of the 60-day notice period, unless the FDIC disapproves the proposed acquisition or extends the notice period as provided in the CBCA.

(2) The notificant(s) may consummate the proposed transaction before the expiration of the 60-day period, including any extensions, if the FDIC notifies the notificant(s) in writing of its intention not to disapprove the acquisition.

(c) Disapproval of acquisition of control. Subpart D of 12 CFR part 308 sets forth the rules of practice and procedure for a notice of disapproval.

#### § 303.87 Public notice requirements.

(a) Publication—

(1) Newspaper announcement. Any person(s) filing a notice under this subpart shall publish an announcement soliciting public comment on the proposed acquisition. The announcement shall be published in a newspaper of general circulation in the community in which the home office of the covered institution to be acquired is located.

(2) Timing of Publication. The announcement shall be published as close as is practicable to the date the notice is filed with the appropriate FDIC office, but in no event more than 10 calendar days before or after the filing date. If the filing is not filed in accordance with the CBCA and this subpart within the time periods specified herein, the acquiring person(s) shall, within 10 days of being so directed by the FDIC to file a Notice, publish an announcement of the acquisition of control.

(3) Contents of newspaper announcement. The newspaper announcement shall conform to the public notice requirements set forth in § 303.7. If the filing is not filed in accordance with the CBCA and this subpart within the time periods specified herein, the announcement shall also include the date of the acquisition and contain a statement indicating that the FDIC is currently reviewing the acquisition of control.

(b) Delay of publication. The FDIC may permit delay in the publication required by this section if the FDIC determines, for good cause, that it is in the public interest to grant such a delay.

Requests for delay of publication may be submitted to the appropriate FDIC office.

(c) Shortening or waiving public comment period, waiving publications; acting before close of public comment period. The FDIC may shorten the public comment period to a period of not less than 10 days, or waive the public comment or newspaper publication requirements of paragraph (a) of this section, or act on a notice before the expiration of a public comment period, if it determines in writing either that an emergency exists or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety and soundness of the State nonmember bank or State savings association to be acquired.

(d) Consideration of public comments. In acting upon a notice filed under this subpart, the FDIC shall consider all public comments received in writing within 20 days following the required newspaper publication or, if the FDIC has shortened the public comment period pursuant to paragraph (c) of this section, within such shorter period.

#### § 303.88 Reporting of stock loans and changes in chief executive officers and directors.

(a) Requirements of reporting stock loans.

(1) Any foreign bank or affiliate of a foreign bank that has credit outstanding to any person or group of persons, in the aggregate, which is secured, directly or indirectly, by 25 percent or more of any class of voting securities of a covered institution, shall file a consolidated report with the appropriate FDIC office.

(2) Any voting securities of the covered institution held by the foreign bank or any affiliate of the foreign bank as principal must be included in the calculation of the number

of voting securities in which the foreign bank or its affiliate has a security interest for purposes of paragraph (a) of this section.

(b) Definitions. For purposes of paragraph (a) of this section:

(1) Foreign bank shall have the same meaning as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(2) Affiliate shall have the same meaning as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(3) Credit outstanding includes any loan or extension of credit; the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit; and any other type of transaction that extends credit or financing to the person or group of persons.

(4) Group of persons includes any number of persons that the foreign bank or any affiliate of a foreign bank has reason to believe:

(i) Are acting together, in concert, or with one another to acquire or control voting securities of the same covered institution, including an acquisition of voting securities of the same covered institution at approximately the same time under substantially the same terms; or

(ii) Have made, or propose to make, a joint filing under section 13 or 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78n), and the rules

promulgated thereunder by the Securities and Exchange Commission  
regarding ownership of the voting securities of the same covered institution.

(c) Exceptions. Compliance with paragraph (a) of this section is not required if:

(1) The person or group of persons referred to in paragraph (a) has disclosed the amount borrowed and the security interest therein to the appropriate FDIC office in connection with a notice filed under the CBCA, an application filed under either 12 U.S.C. 1841, et seq. or 12 U.S.C. 1467a, or any other application filed to the FDIC as a substitute for a notice under § 303.82 of this subpart, including an application filed under section 18(c) of the FDI Act (Bank Merger Act, 12 U.S.C. 1828(c)) or section 5 of the Federal Deposit Insurance Act (12 U.S.C. 1815); or

(2) The transaction involves a person or group of persons that has been the owner or owners of record of the stock for a period of one year or more; or, if the transaction involves stock issued by a newly chartered bank, before the bank is opened for business.

(d) Report requirements for purposes of paragraph (a) of this section.

(1) The consolidated report must indicate the number and percentage of voting securities securing each applicable extension of credit, the identity of the borrower, the number of voting securities held as principal by the foreign bank and any affiliate thereof, and any additional information that the FDIC may require in connection with a particular report.

(2) A foreign bank, or any affiliate of a foreign bank, shall file the consolidated report in writing within 30 days of the date on which the foreign bank or affiliate first believes that



the security for any outstanding credit consists of 25 percent or more of any class of voting securities of a covered institution.

(e) If the foreign bank, or any affiliate thereof, is not supervised by the FDIC, it shall file a copy of the report filed under paragraph (a) of this section with its appropriate Federal banking agency.

(f) Reporting requirement. After the consummation of a change in control, a covered institution must notify the FDIC in writing of any changes or replacements of its chief executive officer or of any director occurring during the 12-month period beginning on the date of consummation.

This notice must be filed within 10 days of such change or replacement and must include a statement of the past and current business and professional affiliations of the new chief executive officers or directors.

§§303.89-303.99 [Reserved]

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## **PART 391 – FORMER OFFICE OF THRIFT SUPERVISION REGULATIONS**

4. The authority for part 391 is revised to read as follows:

Authority: 12 U.S.C. 1819 (Tenth).; Subpart A also issued under 12 U.S.C. 1462a; 1463; 1464; 1828; 1831p–1; 1881–1884; 15 U.S.C. 1681w; 15 U.S.C. 6801; 6805.; Subpart B also issued under 12 U.S.C. 1462a; 1463; 1464; 1828; 1831p–1; 1881–1884; 15 U.S.C.1681w; 15 U.S.C. 6801; 6805.; Subpart C also issued under 12 U.S.C. 1462a; 1463; 1464; 1828; 1831p–1; and 1881–1884; 15 U.S.C. 1681m;

1681w.; Subpart D also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 42 U.S.C. 4012a; 4104a; 4104b; 4106; 4128.

Subpart E – [Removed and reserved]

5. Remove and reserve part 391 subpart E consisting of §§ 391.40 through 391.48.

By order of the Board of Directors.

Dated at Washington, DC this 18th day of November, 2014.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Executive Secretary

[FR Doc. 2014-27609 Filed 11/24/2014 at 8:45 am; Publication Date: 11/25/2014]